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Supreme Court of the United States

OCTOBER TERM, 1970

No. 902

MARION LACKEDQUIST, RICHARD B. HARDING, CARLOS ALLEN BLACK, MICHAEL DOE, LOUIS [illegible], PITTMAN, WALLACE LEE CAMPBELL, JR., ROBERT J. HOWELL, JAMES CLARKE CUNNINGHAM, WILLIAM GLENN TOWNSEND, O. L. HARDEN AND GEORGE TURNER,

Petitioners,

versus

THE STATE OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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[illegible]
[illegible]

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. .....

MARION LAGERQUIST, RICHARD B. HARDING, GARLIE ALLEN BLACK, MICHAEL ROSS, LOUIS BURELL PITTMAN, WALLACE LEE CAMPBELL, JR., ROBERT J. HOWELL, JAMES CLAUDE GOODMAN, WILLIAM GLENN YOUNGINER, O. L. HAYDEN AND GEORGE TURNER,

Petitioners,

versus

THE STATE OF SOUTH CAROLINA

Petition For a Writ of Certiorari to the Supreme Court of South Carolina

The petitioners pray that a writ of certiorari issue to review the decree of the Supreme Court of South Carolina, filed on July 30, 1970.

OPINION BELOW

The opinions of the inferior courts of South Carolina are not reported. Nevertheless, two opinions of the Court of General Sessions, affecting this matter and dated January 28, 1970, and February 14, 1970, are printed in the appendix, *infra*, pp. 11, 15. The opinion of the South Carolina Supreme Court filed July 30, 1970, has not yet been reported and is printed in the appendix, *infra*, p. 17.

JURISDICTION

The decision of the South Carolina Supreme Court, the highest court of the state, was filed on July 30, 1970, and a petition for rehearing was denied on August 18, 1970, whereby the petitioners have no further appellate remedy under the laws of the State of South Carolina.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3), whereby petitioners assert the denial of rights and privileges guaranteed by the United States Constitution.

QUESTIONS PRESENTED

I

Does the speedy trial guaranty of the Sixth Amendment to the United States Constitution extend to a state appellate process and afford a remedy to the petitioners who, despite every reasonable effort, were unable to obtain a transcript of their trial record from an official state court reporter in order to perfect their appeal until almost three years after trial and conviction?

II

Have the petitioners been denied the fundamental rights of due process of law and equal protection of the laws, given by the Fourteenth Amendment to the United States Constitution, by the failure of an official state court reporter to furnish a transcript of their trial record for appeal until almost three years after the date of trial, and by arbitrary preferences given by that reporter to the production of transcripts for other appeals, civil and criminal, for trials in cases occurring after the trial of petitioners?

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution, the Sixth and Fourteenth Amendments, are set out in the appendix, *infra*, p. 21.

STATEMENT

The eleven petitioners were formerly agents of the Kennesaw Life & Accident Insurance Company. On May 2, 1966, they were indicted for the crime of conspiracy, the charge being that they had conspired to unlawfully obtain insurance dividend funds from certain policyholders of a company which had merged with Kennesaw and to use these funds to pay for new policies of insurance issued by their company. They were tried in the Court of General Sessions, Greenville County, South Carolina, in March 1967, and on March 29, 1967, a jury returned a verdict of guilty as to all. A motion for a new trial was overruled on March 31, 1967, and on that day petitioners' counsel asked the official state reporter to prepare a transcript for appeal, i.e., reduce her stenographic notes of the trial proceedings to writing. When a notice of appeal was given on April 14, 1967, the transcript was formally requested (even though no formality of request is required by law or custom in South Carolina). On April 17, 1967, the trial court extended the time for perfecting an appeal until 60 days after the furnishing of the written transcript.

In April 1968, one whole year after the transcript had been requested, a request was made for an original *and a copy* of the transcript, it being the thought of petitioners' counsel that the promise of more money might motivate the reporter to do the work. (The record will reflect that the remuneration to be received by the reporter was substantial. When the transcript was finally furnished in February 1970, the reporter's charge was $1,740.00, of which $696.00 was solely for the extra copy.) This attempted motivation was futile. Another year passed, and more, and still nothing was heard from the reporter. Finally, on December 11, 1969, more than 32 months after March 1967, and no transcript having been furnished or, for that matter, even promised, petitioners' counsel filed a motion to vacate the judgments of conviction. The gravaman of that motion was that the petitioners had been denied, first, the right to a speedy trial and the right to a speedy remedy; and, second, due process and equal protection of the laws,

through the failure of the state to allow the protection of an appeal by inordinate delay in the delivery of a transcript, and by preference given to the delivery of transcripts in other cases, both criminal and civil, which had been tried after the trial of the petitioners. (This was the first instance of a claim of denial of rights protected by the United States Constitution.)

To this motion to vacate, the circuit solicitor filed a Return, attaching an affidavit from the official court reporter which recited claims in attempted amelioration of the extraordinary delay. The issue before the trial court, upon a hearing on affidavits on January 19, 1970, resolved to the question whether there was any excuse for the delay. The court reporter, through her affidavit, sought to excuse the delay by general and vague assertions about the press of business — about the demands on her time having been too great. The trial court obviously accepted those representations since they are set out, in almost the same sequence as they were given, in the court's order dated January 26, 1970. (Appendix pp. 11, 13) The trial court concluded that the delay was not the result of a *deliberate* attempt to hinder or harass the petitioners, but rather was the result of circumstances peculiar to the case, i.e., that, in essence, the court reporter had been too busy. Thereupon, the trial court concluded that there was nothing to indicate that the delay was the result of *callous indifference* or *deliberate purpose*, either to delay or deny the petitioners' appeal to the Supreme Court of South Carolina, from which the court also concluded that the contentions that the delay had resulted in a denial of equal protection of the laws and a speedy trial were without merit. No mention was made of due process. The court stated that the petitioners' appellate rights were still intact and ordered that the court reporter produce the transcript by February 15, 1970. (It was produced on February 5.)

Since the circumstances "peculiar to the case" were the sole basis for finding that no denial of constitutional rights flowed from the delay, counsel for petitioners conducted an exhaustive search of the official court records to determine whether, truly, the court reporter had been too busy. As a

result of this search, counsel filed a petition for reconsideration on February 3, 1970, and filed with the court various certificates from the clerk of the Supreme Court of South Carolina, and the clerks of court of the two counties within the judicial circuit for which the reporter would be engaged in her work. Affidavits of counsel were also filed. The composite of these, counsel believed, demonstrated conclusively that the generalizations of work requirements submitted in the court reporter's affidavit at the earlier hearing had been inaccurate and led one to infer a truth which in fact did not exist. Nevertheless, the court concluded that, from the entire record, and in the exercise of its discretion, the delay had not denied the petitioners the equal protection of the laws and had not deprived them of a speedy trial. (Appendix pp. 15; 16.)

The denial of the motion to vacate the conviction and the subsequent motion for reconsideration, was appealed to the Supreme Court of South Carolina, and the denial of these motions was affirmed by the Supreme Court in a decision filed July 30, 1970. In affirming this denial, that Court declared:

> It is undisputed that the transcript could have been sooner furnished, but was not because of other demands of court work upon the reporter and her judgment, mistaken perhaps, as to the priority to be accorded the various matter which demanded her attention. There is no showing that the delay was arbitrary or purposeful (Appendix, pp. 17, 18).

Counsel does not understand the import of that statement. Nevertheless, the Supreme Court declared that the delay had not deprived the petitioners of any constitutional rights even through the trial transcript should have been furnished with greater dispatch. The court especially declared that the speedy trial guaranty of the Sixth Amendment to the United States Constitution was inapplicable to an appeal. Regarding due process and equal protection, the court found no denial of rights since the petitioners still, though belated, have their right of appellate review. A petition for rehearing, filed August 7, 1970, was denied.

REASONS FOR GRANTING THE WRIT

A need exists for a declaration whether the guarantee of a speedy trial in the Sixth Amendment applies to an appellate procedure. The guaranty attaches to most procedures, whether before, during, or after trial, as pointed out in the special concurring opinion of Justices Brennan and Marshall in *Dickey* vs. *Florida*, 90 S.Ct. 1564 (May, 1970). In this opinion also, the question is raised, but left undecided, whether inappropriate delay in an appellate procedure might be prohibited by the Sixth Amendment.

If the guarantee does not apply, then all questions of delay must be tested under the Fourteenth Amendment's concepts of due process and equal protection. Since these concepts escape precise definition, however, the courts have customarily tested a claimed denial of a right due to delay in terms of whether the delay was arbitrary, purposeful, oppressive, or vexatious. *Harrison* v. *United States*, 387 F.2d 203, 207 (D.C. Cir. 1967). See also, *United States* v. *Ewell*, 383 U.S. 116 (1966); *Pollard* v. *United States*, 352 U.S. 354 (1954). If these tests were fully applied, adequate protection might be afforded, but the temptation is to apply only the test of *intentional* or *purposeful* defaults on the part of some individual or official which causes delay. Witness that here the trial court decided only that the delay was not the result of a *deliberate* attempt to hinder or harass the petitioners. (Appendix p. 13). So also, the Supreme Court of South Carolina found no showing that the delay was arbitrary or purposeful. (Appendix p. 18.)

The eleven petitioners were tried in March 1967 which, at this moment, approaches a delay from 3-1/2 to 4 years. The reason for this delay rests almost entirely with the failure of an official court stenographer of South Carolina to furnish a transcript in a timely fashion. It was not furnished until February 5, 1970, almost 3 years after trial, and, even then, it was not complete until May 29, 1970, when finally, after additional requests, all materials were filed. During this time lapse, petitioners' counsel made several requests for the transcript, but nothing was accomplished until *after* the motion to vacate the

judgments of conviction was filed in December 1969. It was only then that the stenographer represented that she had been too busy because of the demands of the court on her time. When counsel, by affidavits and certificates based upon the actual court records, demonstrated that the reporter's claims were factually inaccurate, the trial court nevertheless concluded that "from the entire record and in the exercise of my discretion that the delay in the preparation of this transcript, which was delivered to defendants' counsel on or about February 5, 1970, has not denied the appellants the equal protection of the laws and has not deprived them of a speedy trial." (Appendix, p. 16.)

In deciding the ultimate issue, the Supreme Court of South Carolina declared that, while the transcript should have been furnished sooner, the delay had not resulted in the denial of any constitutional rights. That court decided summarily that the Sixth Amendment's speedy trial guaranty, and its equivalent in the South Carolina Constitution, was inapplicable to an appeal. Apparently, the due process and equal protection issues were determined by the brief conclusion that there was "no showing that the delay was arbitrary or purposeful." (Appendix p. 18.) While the court also stated that delay which "deprives an accused of the effective exercise of the right of appeal, may amount to a deprivation" of due process and equal protection, it apparently found no significance in the delay *per se*, nor in the selective manner in which the court stenographer gave preference to furnishing transcripts in other cases which occurred after petitioners' trial.

The manner in which both the trial court and the Supreme Court of South Carolina gave lip-service to the concepts of due process and equal protection demonstrates the need for the stricter standard of the Sixth Amendment's guarantee. Within any understanding, the inaction of the State here, through an official court reporter, was arbitrary, oppressive and vexatious. No claim is made that it was purposeful. It was intentional if one is taken to have intended the natural consequences of his acts or omissions. Further, the State has not shown that, in

the history of South Carolina, any appellant has had to wait so long for an official transcript.

Within the framework of the decisions by the trial court and the Supreme Court of South Carolina, it would falsely appear that the only right capable of protection was the right to have an appeal at some point in time. The determination of no denial of this right is couched in the conclusion that petitioners' right of appeal is still intact. Surely, however, petitioners have other rights: The right to an appeal within a reasonable time. The right to at least a chronological preference in the preparation of their transcript. The right to an ultimate determination of their guilt without laboring under the unresolved charge for months and years. The right to freedom from public accusation which followed them even after trial. The right to be able to secure jobs which required a state license. The right to restore their financial standing. The right to have counsel with fresh memories of the faults of the protracted trial. The right to have counsel whose enthusiastic belief in their clients' innocence has not been shopworn by the attrition of interminable delay. These are not merely visionary or conceptualized rights; they are the essential components of our precepts of ordered justice.

If the Sixth Amendment's guaranty applies to appellate procedures, there are ample guidelines by this Court for measuring whether extraordinary delay has worked an infringement of rights. For example, no showing of actual prejudice is required, *Klopfer v. North Carolina*, 386 U.S. 213 (1967), orderly expedition is required, *Smith v. United States*, 360 U.S. 1 (1959), and even negligent delay is suspect, *Hanrahan v. United States*, 348 F.2d 363 (D.C. Cir. 1965). Moreover, Justices Brennan and Marshall, in *Dickey v. Florida*, *supra*, pointed out that the legitimacy of delay might be tested on a basis of reasonableness — whether the delay was unnecessary. Such considerations are immeasurably easier to apply than determining whether delay has been arbitrary, purposeful, oppressive or vexatious, especially if, as here, the courts constrict these several tests to synonymity with deliberate intent.

The petitioners have been abused by the judicial processes

of the State of South Carolina which, through the inaction of a state official, have delayed, hindered and frustrated their efforts to perfect an appeal on the merits of their convictions to the South Carolina Supreme Court. If it is true that a substantial number of convictions are reversed by state appellate courts, *Griffin v. Illinois*, 351 U.S. 12, 19 (1956), then, indeed, trial procedure is only one part of a speedy trial process, and effective appellate procedure should be equally safeguarded.

On the belief that the delay here has resulted in a denial of rights accorded them under the Sixth and Fourteenth Amendments to the United States Constitution, petitioners respectfully pray that a writ of certiorari issue to the the Supreme Court of South Carolina.

Respectfully submitted,
Hoke Smith
Wesley M. Walker
O. Doyle Martin

APPENDIX

APPENDIX A

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF GENERAL SESSIONS

The State,

v.

Marion Lagerquist, Richard B. Harding, Carlie Allen Black, Michael Ross, Louis Burell Pittman, Wallace Lee Campbell, Jr., Robert J. Newell, James Claude Goodman, William Glenn Younginer, O. L. Hayden and George Turner,

Defendants.

ORDER

No. D-3423
Appeal Calendar Case No. 46

This matter comes before the Court upon the motion of the defendants to vacate the judgments of conviction returned against them on March 29, 1967, following a lengthy trial upon an indictment that charged them with having committed the offense of criminal conspiracy. The defendants contend that their convictions should be set aside because, it is submitted, the failure, to date, of the Court Reporter of the Thirteenth Judicial Circuit to provide them with a transcript of the trial testimony, which they require in order to perfect their appeal to the Supreme Court of South Carolina, has resulted in the denial to them of the equal protection of the laws and has operated to deprive them of their right to a "speedy trial."

Two days after they were convicted, the defendants, all of whom were permitted to post appeal bonds, moved for a new trial; and when the Court refused to grant it the defendants, on April 4, 1967, gave notice of their intention to appeal from the judgments of conviction. The Court, on April 17, 1967, extended the time within which the defendants had to

perfect their appeal to the Supreme Court of South Carolina until sixty (60) days after the delivery to them of the trial transcript. A request for that transcript apparently was orally communicated to the Court Reporter of the Thirteenth Judicial Circuit at or about the same time that the notice of intention to appeal was served. Another request for the transcript was made in writing on April 19, 1988. Although some of the transcript was given to the defendants' attorneys on or about March 25, 1988, the major portion thereof has not been delivered to them. It has yet to be completely transcribed.

While this Court does not condone the delay which has occurred in the preparation of the transcript, the defendants' contention that the delay has denied them the equal protection of the laws and has deprived them of a speedy trial must be regarded as being without merit.

As was stated in *United States v. Cifarelli*, 401 F. (2) 512 (1968), at page 514:

> The delay was unfortunate, but the constitutional guarantee to a speedy trial upon which appellant relies cannot be easily transposed to an appeal. The purpose of the guarantee is to prevent long unjustified incarceration or anxiety prior to trial and to limit the possibility that the memory of witnesses may dim or evidence may be lost, thus, impairing the ability of the accused to defend himself. *United States v. Ewell*, 383 U.S. 116, 120 S.Ct. 773, 15 L.Ed. (2) 627 (1966). On the other hand, delay in appeal is not truly prejudicial except in case of reversal. This is not such a case.

And in the case of *State ex rel. Mastrian v. Tahash*, ... Minn. ....., 152 N.W. (2) 786 at 789 (1967) it is stated:

> No decision of the United States Supreme Court has yet held that the right to a speedy trial includes the right to speedy appellate review within the sense of the Sixth Amendment. Mr. Justice Harlan wrote, although in a different context, 'It would be painting

with too broad a brush to conclude that . . . an appeal is just like a trial.'

As in the case just cited, the delay in the preparation of the trial transcript has not been the product of a deliberate attempt to hinder or harass the defendants. Rather, it is the result of circumstances that are peculiar to this case. One problem has been the lack of an opportunity for the Court Reporter, Mrs. Elizabeth R. Bobo, to devote full time to the transcription of the stenographic notes which relate to the defendants' trial. In addition to the regular terms of court conducted in Greenville and Pickens Counties, which make up the Thirteenth Judicial Circuit, she has had to attend several special terms of court also held in that circuit. Further, Mrs. Bobo has been required to produce a number of transcripts for indigent prisoners who sought release from confinement by way of *habeas corpus*; and she has prepared several transcripts that related to the trials of defendants who, unlike Lagerquist and the others, were imprisoned instead of free on bond. Moreover, she has, from time to time, worked on the defendants' transcript and has completed about (1/3) of it. Another problem, of course, is the utter volume of the testimony which, in any event, would require a considerable amount of time to transcribe. The trial was a long one in that it lasted approximately nine (9) days. If there exists anything which would indicate that the delay in providing the defendants with a transcript of the trial testimony was the result of callous indifference or deliberate purpose either to delay or deny the defendants' appeal to the Supreme Court, it has not been brought to the attention of this Court. *Harrison v. United States*, 387 F. (2) 203 (1967), rev'd on other grounds, 392 U.S. 219, 88 S.Ct. 2008, 20 L. Ed. (2) 1047 (1968).

> Although . . . the delay encountered by (the defendants is) unfortunate, (this Court) cannot say it (has been) unreasonable or oppressive in a constitutional sense. Whether or not (the defendants) rights were grounded on either the Sixth or Fourteenth Amendment, those rights are necessarily relative and are

consistent with delays that are neither purposeful nor oppressive. *United States v. Ewell*, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed. (2) 627; *Pollard v. United States*, 352 U.S. 354, 77 S.Ct. 481, 1 L. Ed. (2) 393. *State ex rel. Mastrian v. Tahash*, supra at 789.

Finally, it should be noted that this is not a case in which the defendants have lost their right to appeal because of a delay in the preparation of a trial transcript; *Russell v. State ex rel. Arthur*, ... Tenn. ...., 401 S.W. (2) 586; that right has been preserved until at least sixty (60) days after the receipt by the defendants of the transcript, at which time they must serve their proposed case and exceptions upon the State.

Obviously then, even were this Court to conclude that the defendants' constitutional rights have been infringed by the delay, the remedy is not to vacate their judgments of conviction but to correct the error. *Pollard v. United States*, supra; *State ex rel. Mastrian v. Tahash*, supra. The defendants have wanted an adequate and effective appellate review of the merits of their original convictions, and they shall have it. In accordance with that aforestated and in the exercise of my discretion, it is

Ordered, Adjudged, and Decreed that the defendants' motion for vacation of their judgments of conviction be, and the same hereby is, denied; and it is further

Ordered, Adjudged, and Decreed that the official Court Reporter of the Thirteenth Judicial Circuit, by no later than February 15, 1970, deliver to the attorneys for the defendants a complete trial transcript relating to the judgments of conviction from which the defendants have endeavored to appeal and that a certified copy of this Order be served upon that Court Reporter.

AND IT IS SO ORDERED.

J. B. Ness, *Presiding Judge*
Thirteenth Judicial Circuit

January 26, 1970
Greenville, S. C.

APPENDIX B

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF GENERAL SESSIONS

The State,

v.

Marion Lagerquist, Richard B. Harding, Garlie Allen Black, Michael Ross, Louis Burell Pittman, Wallace Lee Campbell, Jr., Robert J. Newell, James Claude Goodman, William Glenn Younginer, O. L. Hayden and George Turner,

Defendants.

ORDER

No. D-3423
Appeal Calendar Case No. 46

The appellants heretofore moved before this Court for an Order vacating the judgment of their conviction basically upon the grounds that the failure of the Court Reporter to furnish them with a copy of the transcript denied to each of them due process of law under the Constitution.

This Court, on January 26, 1970, issued its Order denying said motion.

This is a motion by the appellants for reconsideration of said original motion upon the grounds that the affidavit of Elizabeth R. Bobo, dated December 23, 1969, contains factual mistakes and inaccuracies.

It appears that after the motion for a new trial was overruled, the attorneys for the defendants orally requested of Mrs. Bobo, Court Reporter, a transcript of the record and then by letter dated April 18, 1967 to Solicitor Thomason, a copy of which was sent to Mrs. Bobo, confirmed this request. Subsequently the attorneys for the defendants requested the Court Reporter that she furnish defendants the testimony of the witness, Thomas Self; that this testimony was transcribed and delivered to the defendants' attorneys on or about March 25, 1968, and on April 19, 1968 defendants' attorneys wrote a

letter to Mrs. Bobo requesting two (2) copies of the entire transcript excluding that of Thomas Self.

There have been filed at this hearing affidavits of the Clerks of Court of Greenville County and Pickens County and other affidavits.

While this Court certainly does not condone the delay which has occurred in the preparation of this transcript, it is apparent that the Court Reporter was engaged in the performance of her normal duties both in Greenville and Pickens Counties, that she prepared certain other transcripts for appeal, and this Court must take judicial notice of the fact that in many instances transcripts and portions of transcripts are prepared by the Court Reporter from which no appeal is ever perfected. There is also an affidavit from the Attorney General's office that since March, 1967 a number of transcripts for which the appeal the appeal was not perfected were prepared by this Court Reporter for the Attorney General's office and that the Thirteenth Judicial Circuit has had more post conviction activity than any other Circuit in the State.

I must conclude from the entire record and in the exercise of my discretion that the delay in the preparation of this transcript, which was delivered to defendants' counsel on or about February 5, 1970, has not denied the appellants the equal protection of the laws and has not deprived them of a speedy trial. If the appellants felt that the delay was denying them any rights, they could have applied to the Court for whatever Order would have been necessary to expedite their appeal. This they failed to do through their experienced retained counsel.

In accordance with my Order of January 26, 1967 and in accordance with that which is aforestated and in the exercise of my discretion upon a full consideration of the entire record before me, it is

Ordered, Adjudged and Decreed that the motion of the defendants, be and the same is hereby, denied.

J. B. Ness, *Presiding Judge*
Thirteenth Judicial Circuit

Bamberg, S. C.
February 14, 1970.

APPENDIX C

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... *Respondent,*
Marion Lagerquist, Richard B. Harding, Carlie Allen Black, Michael Ross, Louis Burell Pittman, Wallace Lee Campbell, Jr., Robert J. Howell, James Claude Goodman, William Glenn Younginer, O. L. Hayden and George Turner, ... *Appellants*

Appeal From Greenville County
J. B. Ness, Judge
Opinion No. 19091
Filed July 30, 1970

AFFIRMED

Wesley M. Walker, Herman E. Cox and Ernest J. Howard, all of Greenville; and Hoke Smith, of Smith, Cohen, Ringel, Kohler, Martin & Lowe, of Atlanta, Georgia, for appellants.

Solicitor B. O. Thomason, Jr., of Greenville; and Attorney General Daniel R. McLeod and Assistant Attorneys General C. Tolbert Goolsby, Jr., and Joel E. Gottlieb, all of Columbia, for respondent.

LEWIS, A. J.: Appellants were convicted in the Court of General Sessions for Greenville County of criminal conspiracy and served notice of intention to appeal to this Court. They subsequently moved to set aside their convictions on the grounds that delay of the court reporter in providing them with a transcript of the trial proceedings had deprived them of due process, equal protection of the laws, and the right to a speedy trial or remedy as guaranteed by the State and Federal Constitutions. This appeal is from the order of the lower court denying the motion to dismiss the convictions. We affirm.

A detailed review of the various facets of the factual controversy would serve no useful purpose. It is conceded that appellants were convicted on March 29, 1967 and thereafter

timely served notice of intention to appeal, which was followed by an immediate request for a transcript of the record from the court reporter. The trial consumed approximately nine (9) days and all parties recognized that the court reporter could not complete the trial transcript in time for appellants to timely perfect the appeal. Accordingly, a consent order was issued by the trial court extending the time for perfecting the appeal until sixty (60) days after the furnishing of the transcript The appellants were admitted to bail pending the appeal.

The motion to set aside their convictions was made by appellants on December 11, 1969, approximately thirty-two (32) months after the initial request for the trial transcript. The motion followed two or three additional requests to the court reporter that the record be furnished. However, no application was ever made to the court for an order requiring that the court reporter transcribe the record more promptly.

It is undisputed that the transcript could have been sooner furnished, but was not because of other demands of court work upon the reporter and her judgment, mistaken perhaps, as to the priority to be accorded the various matters which demanded her attention. There is no showing that the delay was arbitrary or purposeful.

The transcript of the record was finally completed on February 5, 1970, eliminating the only impediment to the prosecution of the appeal on the merits.

Appellants content that the delay (1) has denied them the right to a speedy trial and remedy guaranteed to them by Article 1, Sections 15 and 18 of the South Carolina Constitution and by the Sixth Amendment of the United States Constitution: and (2) has deprived them of due process and equal protection of the laws guaranteed to them by Article 1, Section 5 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

While the trial transcript should have been furnished with greater dispatch, the record fails to show that the delay has deprived appellants of any constitutional rights.

The guaranties afforded by Article 1, Section 18 of the South Carolina Constitution and by the Sixth Amendment to

the Constitution of the United States are inapplicable to an appeal. These provisions expressly state that the accused shall enjoy the right to a "speedy and public trial, by an impartial jury." The *trial* referred to means a trial by a jury to determine guilt or innocence and does not include an *appeal* which is simply the method provided for review of the proceedings in a trial which has already been held.

Appellants contend however that Article 1, Section 15, of the South Carolina Constitution guarantees to them a "speedy remedy" which includes the right to a "speedy appeal." Citing Rylee v. Marett, 121 S. C. 366, 113 S. E. 483.

Article 1, Section 15, provides:

> "All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained."

The following statement is found in the Rylee case, upon which appellants rely:

> "A lax observance of the very reasonable regulations prescribed by the statute and the rules of Court for perfecting appeals can but lead to unnecessary delay in the final dispositions of causes in our courts, and thus work infringement of the Constitutional guaranty (Section 15, Art. 1, Const., 1895) that 'every person shall have speedy remedy therein for wrongs sustained'."

In Rylee, the foregoing dicta was used with reference to an appeal in a civil case. The guaranty, in Article 1, Section 15, of a speedy remedy for wrongs sustained has no application to a criminal prosecution. The word *wrongs* embraces "every injury to or impairment of rights of person or property." Davis v. Whitlock, 90 S. C. 233, 73 S. E. 171. *Remedy* simply denotes the means by which such a wrong is redressed in a civil proceeding. The application of Article 1, Section 15, to civil remedies *only* is clear, we think, when reference is made to Section 18 of Article 1. The latter section specifically refers to "criminal prosecutions" and guarantees to an accused "the right to a speedy and public trial." Such guaranty in Section

18 would have been unnecessary if it had been intended that Section 15 apply to criminal proceedings.

The foregoing does not mean however that the right of appeal is beyond the reach of constitutional protection. Where a right of appeal is granted, an accused must be afforded due process and equal protection of the laws in its exercise. Delay, which deprives an accused of the effective exercise of the right of appeal, may amount to a deprivation of such rights. The record before us, however, fails to show an infringement of any right of appellants to obtain appellate review of their convictions.

The only purpose in obtaining the transcript of the trial proceedings was to enable appellants to assert their right to an appellate review upon the merits of their convictions. The delay has not deprived them of that right. They may still assert it. Although delayed, there is no showing that the appeal upon the merits cannot be just as effectively prosecuted now as earlier. Therefore, the contention that they have been deprived of due process and equal protection of the laws is without merit.

Judgment affirmed.

MOSS, C. J., BUSSEY, BRAILSFORD and LITTLEJOHN, J. J., concur.

APPENDIX D

THE STATE OF SOUTH CAROLINA

In The Supreme Court

The State, ... *Respondent,*

v.

Marion Lagerquist, Richard B. Harding, Garlie Allen Black, Michael Ross, Louis Burell Pittman, Wallace Lee Campbell, Jr., Robert J. Howell, James Claude Goodman, William Glenn Younginer, O. L. Hayden and George Turner, ... *Petitioners*

PETITION FOR REHEARING

PETITION DENIED.

Joseph R. Moss, C.J.
J. Woodrow Lewis, J.
Thomas P. Brissey, J.
J. M. Brailsford, J.
Bruce Littlejohn, J.

August 18, 1970

APPENDIX E

CONSTITUTIONAL PROVISIONS

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. • • •

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Supreme Court of the United States

OCTOBER TERM, 1970

No. 862

MARION LAGERQUIST, RICHARD B. HARDING, GARLIE ALLEN BLACK, MICHAEL ROSS, LOUIS BURELL PITTMAN, WALLACE LEE CAMPBELL, JR., ROBERT J. HOWELL, JAMES CLAUDE GOODMAN, WILLIAM GLENN YOUNGINER, O. L. HAYDEN AND GEORGE TURNER, PETITIONERS,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the South Carolina Supreme Court (App. C of Petition) is reported at 254 S. C. 501, 176 S. E. (2d) 141.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I

Does the speedy trial guaranty of the Sixth Amendment to the United States Constitution extend to state appellate procedure?

II

Is delay in obtaining appellate review a denial of due process of law and equal protection of the laws when no prejudice results therefrom?

STATEMENT

The respondent would respectfully refer the Court to the facts as found by the Court of General Sessions, Greenville County (Petition, App. A), and the opinion of the Supreme Court of South Carolina, *State v. Lagerquist, et al.*, 254 S. C. 501, 176 S. E. (2d) 141 (Petition, App. C).

In addition the respondent would show the Court that the appeal on the merits in the instant case was argued before the Supreme Court of South Carolina on January 12, 1971. A decision has not yet been rendered by that court.

ARGUMENT

It is submitted that review on certiorari is unwarranted in the instant case. Although this Court has never specifically ruled on the applicability of the Sixth Amendment speedy trial guarantee to appellate procedure it has considered the question of appellate delay and has held it to come within the scope of the Fourteenth Amendment. *Dowd v. United States*, 340 U. S. 206, 71 S. Ct. 262, 95 L. Ed. 215 (1951). In *Dowd* this Court held also that where there has been a violation of the equal protection guarantees of the Fourteenth Amendment the proper remedy would be for the state to allow appellate review on the merits of the conviction. Such was the effect of the ruling

of the South Carolina Supreme Court in the instant case. That court acknowledged that due process and equal protection govern appellate procedures but found that the delay was neither arbitrary nor purposeful and that it did not prejudice petitioners' right of appeal.

The decision in the instant case is consistent with the cases of other jurisdictions. In *Newsom v. Peyton*, 341 F. (2d) 904 (4th Cir. 1965) the petitioner had been denied his right to counsel for purposes of appealing to the Supreme Court of Virginia. The Court specified that the judgment should not be vacated unless the state supreme court would not hear the appeal and a retrial was unavailable. It is interesting to note that the lapse of time between the conviction and that case was nearly twelve years. See, too, *Newsom v. Commonwealth*, 207 Va. 844, 153 S. E. (2d) 235 (1967) in which the Supreme Court of Virginia heard the appeal some fourteen years after conviction and affirmed.

Assuming, *arguendo*, that the delay had resulted in a denial of certain rights of the petitioners such would "not require that a verdict be upset . . ., but only that the state should allow the completion of appellate review. . . ." *United States ex rel. Smith v. McMann*, 417 F. (2d) 648, 655 (2d Cir. 1969); See *Byrd v. Smith*, 407 F. (2d) 363 (5th Cir. 1969); *People v. Callaway*, 24 N. Y. (2d) 127, 247 N. Y. S. (2d) 128 (1969). In *Coffman v. Bomar*, 220 F. Supp. 343, 349 (M. D. Tenn. 1963) the Court, in reversing a conviction because the defendant's right to appeal had been frustrated, acknowledged that had an appeal still been available under state procedure the proper remedy would be to allow the completion of appellate review. See also *State ex rel. Banach v. Boles*, 147 W. Va. 850, 131 S. E. (2d) 722, 728 (1963). "Merely because [their] personal rights may have been denied in the context of criminal proceedings, the accused [are] not automatically excused from

the penalties imposed by the law for [their] wrongdoing." *Hyler v. United States*, 402 F. (2d) 558, 560 (5th Cir. 1969).

It is submitted that "there is no absolute right to a speedy appeal. . . ." *Norris v. South Carolina*, No. 13,085 (4th Cir. April 9, 1969) (Mem. Dec., a copy of which is submitted as an Appendix). Assuming, however, *arguendo*, that the speedy trial guarantee of the Sixth Amendment and the cases thereunder were applicable to appellate procedures the outcome of the instant case would remain unaffected. The delay was neither purposeful nor oppressive in a constitutional sense. See *United States v. Ewell*, 383 U. S. 116, 86 S. Ct. 773, 15 L. Ed. (2d) 627 (1966). And although unfortunate, the delay was not, under the circumstances, so unduly long to in itself constitute a violation of the Sixth and Fourteenth Amendments. The right to a speedy trial "is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Harrison v. United States*, 387 F. (2d) 203, 206-207 (1967) quoting from *Beavers v. Haubert*, 198 U. S. 77, 87, 25 S. Ct. 573, 49 L. Ed. 950 (1905).

Furthermore, the petitioners made no application to the court for an order requiring that the record be transcribed more promptly.

And finally, the petitioners' right of appeal has not been frustrated. Since the filing of the Petition in the instant case the appeal on the merits has been argued before the Supreme Court of South Carolina. (January 12, 1971). The appeal, of course, was based solely on the record below. Unlike a trial the problems of fading memories and unavailable witnesses were nonexistent. The petitioners' appeal was not prejudiced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL R. McLEOD,
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Counsel for Respondent.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 13,085

MALVIN E. NORRIS, APPELLANT,

versus

STATE OF SOUTH CAROLINA, COUNTY OF GREENVILLE, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA

MEMORANDUM DECISION

Malvin E. Norris, a South Carolina prisoner, seeks to appeal a denial by the District Court (Hemphill, J.) of his "Petition for the Issuance of Writ of Mandamus."

A jury convicted Norris of murder and he received a life sentence on December 5, 1966. In his petition, he complained that, although he filed a timely Notice of Intention to Appeal and a request for the appointment of counsel, counsel was not appointed for more than a year afterward and the appeal has still not yet been prosecuted, some two years now having passed since his conviction. He alleges that a *habeas corpus* petition filed in the Greenville County Court of Common Pleas complaining of the delay has been ignored and that his petition for a writ of mandamus directed to the South Carolina Supreme Court seeking to compel a speedy handling of the appeal was dismissed. He therefore contends that he has been denied a prompt appeal and prays that a writ of mandamus be issued to require the state to speedily hear his appeal. He further contends

that he should be deemed to have effectively exhausted his state remedies because of the delay and that the federal courts should now "assume jurisdiction" of his claim.

As there is no absolute constitutional right to a "speedy appeal," Norris is not entitled to the writ of mandamus. However, treating the petition as one seeking *habeas corpus* relief, the District Court improperly dismissed the petition for failure to exhaust state remedies. This court has repeatedly held that long delays by the state in determining a petitioner's claims may "justify a federal court in not requiring exhaustion on the ground that such delays make state remedies ineffective to protect the rights of the prisoner." *Strouth v. Peyton*, 404 F. (2d) 537, ... (4th Cir., Oct. 18, 1968). In *Martin v. Peyton*, No. 11, 646 (4th Cir., March 11, 1968) (Mem. Dec.), we reversed a district court's decision that petitioner had failed to exhaust where there had been an unexplained delay of five months in which no action was taken on his *habeas corpus* petition in a state trial court. Holding that an "[u]nreasonable delay in the processing of state remedies may require a federal court to consider federal claims without first relegating the *habeas corpus* petitioner to recourse in the state courts," we remanded for a determination whether, in fact, action on the petition had been unreasonably delayed.

Accordingly, we remand this case for a determination whether the delay of two years in the processing of Norris' direct appeal has been unreasonable. If this long delay cannot be satisfactorily explained, the District Court is directed to allow Norris to amend his petition to raise any federally cognizable claims he may have relating to his conviction and to consider these claims on their merits.

A certificate of probable cause is granted, the order of the District Court is vacated, and the case is remanded for further proceedings consistent with this opinion.

/s/ SIMON E. SOBELOFF,
United States Circuit Judge.

/s/ HERBERT S. BOREMAN,
United States Circuit Judge.

/s/ ALBERT V. BRYAN,
United States Circuit Judge.

Filed:
April 9, 1969.

SAMUEL W. PHILIPS,
Clerk.